Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 14-50
	)	
2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 09-182
	)	
Promoting Diversification of Ownership in the Broadcasting Services	)	MB Docket No. 07-294
	)	
Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets	)	MB Docket No. 04-256
	)	
Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services	)	MB Docket No. 17-289

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)[1] hereby responds to the above-captioned Notice of Proposed Rulemaking, in which the Commission adopted an incubator program to help increase broadcast station ownership diversity and now seeks comment on how best to structure such a program.[2] We agree with the Commission that a well-designed

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[1] NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9857-9864 ¶¶ 121-145 (2017) (2017 Recon Order or Notice).

incubator program can promote ownership opportunities for new entrants into the broadcasting industry by reducing barriers to entry, such as the lack of operational expertise and access to capital.[3] The Commission's incubator program should strive to increase station ownership by minorities, women and small businesses through mutually beneficial partnerships with more established broadcasters by providing regulatory incentives or benefits for entering into such arrangements.

NAB has long supported creating an incentive-based incubator program, and other regulatory and industry-based measures, to serve the public interest in promoting a diverse broadcast industry.[4] NAB has advocated for workable, legally-supportable mechanisms for tackling the obstacles to increasing ownership diversity, most notably access to capital. We have also supported proposals offered by other stakeholders, such as the Diversity and Competition Supporters,[5] and joined with MMTC to propose some of the key elements of an incubator program.[6]

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[3] Notice, 32 FCC Rcd at 9859 ¶ 127.

[4] *Id., see* Petition for Reconsideration of the National Association of Broadcasters, *2014 Quadrennial Regulatory Review*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Dec. 1, 2016) (2016 NAB Recon Petition); Comments of the National Association of Broadcasters, *2014 Quadrennial Regulatory Review*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Aug. 6, 2014) (2014 NAB Comments); Letter from David Honig, President, Multicultural Media, Telecom and Internet Council (MMTC), and Jane E. Mago, Executive Vice President and General Counsel, NAB, to Ms. Marlene Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 09-182, 07-294 (Jan. 30, 2013) (2013 MMTC/NAB Letter); Comments of the National Association of Broadcasters, *2006 Quadrennial Regulatory Review*, MB Docket Nos. 06-121, 02-277, 01-235, 01-317, 00-233, 04-228 (Oct. 1, 2007) (2007 NAB Comments).

[5] Reply Comments of the National Association of Broadcasters, *2010 Quadrennial Regulatory Review*, MB Docket Nos. 09-192, 07-294, at 2-3 (Jan. 4, 2013).

[6] 2013 MMTC/NAB Letter, attachment.

Additionally, for almost 19 years, the NAB Education Foundation (NABEF) and the Broadcast Education Association (BEA) have sponsored and organized a variety of programs to provide professionals and students with access to employment opportunities in the broadcasting industry, and the training and tools needed to succeed in management and ownership. NABEF's Broadcast Leadership Training program offers MBA-style executive training for station managers and others interested in advancing to senior management or station ownership. To date, 49 graduates have owned, or currently own, broadcast assets and more than 60 percent have been promoted one or more times.[7]

Given our longstanding commitment to expanding ownership opportunities in the broadcasting industry, NAB applauds the Commission's renewed effort to establish an incubator program. In contrast to NAB, groups that purportedly support diversity have failed to constructively engage in efforts to create and implement effective policies to promote new entry, including incubator programs. The FCC should be highly skeptical of these parties' claims that adopting an incubator program would create a loophole in the ownership limits and be too difficult to structure and administer.[8] Their goal is solely to keep the same regime in place, despite the fact that it has only led to a decrease in minority and female ownership.

Below, NAB provides recommendations for the necessary elements of an effective incubator program.[9] Our proposals are grounded in marketplace realities and based on

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[7] For more information, visit https://www.beaweb.org/wp/ and http://www.nabef.org/default.asp.

[8] *See* Notice, 32 FCC Red at 9860 ¶ 128; Opposition to Petitions for Reconsideration, Office of Communication, Inc. of the United Church of Christ (UCC) et al. at 11 (Jan. 24, 2017) (UCC Opposition).

[9] Notice, 32 FCC Rcd at 9859 ¶ 126 (seeking comment on the structure, review, and oversight of an incubator program).

extensive input from broadcast station owners and executives, including minority and female industry leaders and recent entrants into the field.[10] An effective incubator program will involve substantial, good faith commitments from both parties, with clear descriptions of what constitutes sufficient incubation activities. The incubating broadcaster should provide a meaningful financial investment in the station, as well as the training and support needed to enable the incubated entity to successfully own and operate the incubated station or another broadcast property, while still ensuring that the incubated entity retains control of the incubated station. The arrangement should specify how the incubated station will be acquired or designated (e.g., transfer of control, build out a construction permit, invigorate a failing station); span a term of at least three years; and include specific provisions for termination of the relationship, so that the incubated entity will ultimately own and operate a station independent of the incubating party.

To incentivize the participation of established broadcasters, NAB proposes that the incubating entity qualify for a tangible regulatory benefit, such as a waiver of an otherwise-applicable broadcast ownership limit. An incubator program simply will not succeed unless it provides sufficient market-based incentives to ensure significant participation by radio and TV broadcasters. Such incentives were the keys to success in the now-defunct minority tax certificate program, which notably increased minority ownership. In addition, a sustainable program must include a well-defined, legally supportable eligibility standard for incubated entities that minimizes uncertainty. Finally, NAB recognizes that any such program must limit

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[10] NAB also looks forward to reviewing the recommendations of the Commission's Advisory Committee on Diversity and Digital Empowerment (ACDDE), which has been tasked with considering recommendations for increasing diversity in broadcast ownership and management, including an incubator program. NABEF is an active participant in the ACDDE's Broadcast Diversity and Development Working Group.

unnecessary burdens on Commission resources. NAB remains committed to working with the Commission to help establish a successful broadcast incubator program.

II. AN INCUBATOR PROGRAM SHOULD INVOLVE SUBSTANTIAL COMMITMENTS FROM BOTH ESTABLISHED BROADCASTERS AND INCUBATEES

For the incubating relationship to be effective, both parties should be expected to make substantial commitments to the success of their partnership. The incubating entity should commit to providing significant financial and technical support that will promote the long-term success of the incubating entity,[11] while the incubated entity should commit to the steps necessary to become a viable independent broadcaster. Both parties must devote the time and effort needed to fulfill the goals of the program.

The greatest barrier to entry facing prospective owners of broadcast stations is access to capital.[12] While raising capital through equity or debt markets to purchase a broadcast asset is an industry-wide challenge, that challenge is often insurmountable for prospective minority or female owners and small businesses.[13] Thus, the Commission must focus its program on the ability of the established broadcaster to provide an incubated entity access to reasonable financing.

It is also important for the established broadcaster to dedicate executive and management personnel to providing training, strategic advice, technical assistance and

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[11] Notice, 32 FCC Rcd at 9862 ¶ 133.

[12] *Section 257 Triennial Report to Congress,* Report, 31 FCC 12037, 12060 ¶ 78 (2016).

[13] *See, e.g.,* Comments of the National Association of Media Brokers, MB Docket No. 09-182 (Dec. 21, 2012); *2006 Quadrennial Regulatory Review*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5945 ¶ 162 (2008) (2008 Diversity Order); U.S. Government Accountability Office, GAO-08-383, *Media Ownership: Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and Is Difficult to* Assess (March 2008).

other support to the incubated entity. Aside from ensuring that the incubated entity remains aware of standard industry practices and developments, this support will allow the incubated station to succeed in an environment of intense competition from all corners, including tech giants, such as Google, Facebook,[14] multichannel video programming distributors, Netflix, satellite radio, Apple Music, and Spotify,[15] to name a few.

A. The Incubating Entity's Financial Commitment is Essential to the Success of the Incubation Relationship

The established broadcaster's financial commitment is critical to the success of the incubation agreement. The specific financial provisions for incubation arrangements will likely vary, depending on the service type and value of the property, and the wherewithal of each party, among other factors. However, the Commission's prescribed incubator program should specify certain parameters. The established broadcaster should provide direct, substantial financial support to the incubated entity through some combination of loan guarantees, low-interest loans or equity investments.[16] Based on input from NAB members who have been involved on both sides of broadcast transactions, we propose that the incubating entity should be required to either: (1) provide a direct, low-interest loan or an equity investment of a substantial share of the debt or equity needed to acquire the

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[14] Jillian D'Onfro, *Google and Facebook Extend their Lead in Online Ads*, CNBC.com (Dec. 20, 2017) (citing estimates that the two companies account for 73% of all digital advertising), https://www.cnbc.com/2017/12/20/ google-facebook-digital-ad-marketshare-growth-pivotal.html.

[15] *How Many Subscribers Does SiriusXM Have?*, Radio Ink (Jan. 10, 2018) (32.7 million as of Dec. 31, 2017), https://radioink.com/2018/01/10/many-subscribers-siriusxm/; Andrew Liptak, *Apple Music is Set to Surpass Spotify in Paid U.S. Subscribers this Summer*, The Verge (Feb. 4, 2018) (Spotify has 70+ million subscribers, Apple 30+ million subscribers but growing at a faster pace), https://www.theverge.com/2018/2/4/16971436/apple-music-surpass-spotify-us-subscribers.

[16] Notice, 32 FCC Rcd at 9862 ¶ 133.

broadcast property covered by the incubator arrangement and to be operated by the incubated entity; or (2) guarantee a substantial share of the property's debt.[17] Such an approach will make sure that the incubated entity has the available resources to make the station an effective competitor in its local radio or television market.

The financial commitment of the established broadcaster should not, however, impede the incubated entity's control of the incubated station's day-to-day operations, including decisions regarding personnel, programming and finances.[18] The incubated entity will retain ultimate authority over these matters, as well as decisions concerning cost structure, revenue streams, vendors, and community engagement. This level of independence is essential to promoting the new entrant's business growth and experience.

The incubating entity also should make available the technical support, training and other assistance needed by the incubatee to successfully operate the station. This could include a regularly scheduled training program on the various aspects of running a radio or television station – perhaps for a specific number of hours per week or month – plus *ad hoc* strategic advice. The amount of engagement by the established broadcaster may turn on the experience and expertise of the incubated entity. We believe that, should the Commission require adequate investment by the incubating entity, it will be creating the necessary

[17] NAB considered proposing a specific minimum percentage of financial support that an incubating entity should commit. However, based on conversations with member stations, we believe that incubated entities' financial needs may vary.

[18] The Commission has repeatedly observed that it does not have a precise formula or "litmus test" by which it determines control, primarily because it is such a fact-specific determination. The Commission's analysis focuses on who has authority over basic operational policies of the station—control of policies regarding the station's finances, personnel, and programming. *See, e.g.*, *Southwest Texas Broadcasting Council*, 85 FCC 2d 713, 715 (1981); *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), recon. denied, 50 R.R. 2d 1346 (1982).

incentives for the incubator to train and support the incubated entity to help ensure the station's success. Accordingly, the specific details of an incubator arrangement may be best left to the discretion of the parties, within broad parameters set forth by the Commission and subject to regulatory review.

B. The Incubated Entity Must Also Make Substantial Commitments to the Success of the Incubating Relationship

The incubated entity should have specific obligations to participate in an incubator program. First, the incubated entity must be involved in identifying and obtaining the broadcast station at issue. This could take several forms, likely in concert with the established broadcaster:

- Acquire at least one radio and/or television station or construction permit through an assignment, transfer of control or successful auction bid;

- Construct a station consistent with an unbuilt construction permit already held by the incubated entity and secure a license to cover the permit;

- Operate as an incubated entity with regard to at least one existing television station that is dark[19] or that meets the failed/failing station standard in the Commission's rules;[20] or

- Operate as an incubated entity with regard to one or more existing radio station(s) that is dark, bankrupt or financially struggling.

This list is merely illustrative and is not exhaustive. Other appropriate options for identifying and/or obtaining an incubated station certainly exist.

Second, the incubated entity should avail itself of the technical support, training and strategic advice provided by the established broadcaster. It should also expect to engage in good faith efforts to successfully construct and/or operate the incubated station(s), fully

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[19] 47 U.S.C. § 312(g).

[20] *See, e.g.*, 47 C.F.R. § 73.3555(b).

comply with the terms of incubator agreement and follow Commission rules and policies governing incubator arrangements. Given the Commission's overall goal to promote broadcast station ownership diversity for the long-term, the Commission should require the incubated entity to take concrete steps toward obtaining a broadcast property and becoming an independent broadcaster once the incubation period expires. This could include making financial and other arrangements toward the acquisition of full ownership of the station subject to the incubation agreement or another broadcast property.

While the Commission should monitor program participation and outcomes, it should not direct or limit the incubatee's activities following its participation in the incubator program, as various scenarios could result. As NAB members have pointed out, there may be multiple paths to station ownership for the incubated entity. It may acquire the interest of the established broadcaster in the incubated station. Alternatively, the incubating broadcaster may choose to acquire the incubatee's interest, or the parties may agree to sell the station to a third party, both of which should help fund the incubatee's investment in another property. Another possibility is that the incubatee may seek to participate in another incubator arrangement, perhaps with a larger financial stake or at a bigger station in a larger market. The Commission should remain flexible, however, as it will want to account for a variety of arrangements that could lead to a successful incubated entity.

C. Parties Should Enter into a Written Agreement Detailing Their Obligations Under the Incubation Relationship

Applicants for the incubator program should enter into a written agreement setting forth the obligations of both parties. The Commission should permit the parties to construct an agreement that reflects their assessment of the business risks and opportunities within some broad regulatory parameters. The agreement should discuss the process for obtaining the station to be incubated, and clearly describe the roles and responsibilities of each party, including the incubating entity's financial investment, and make clear that the incubated entity will maintain operational and management control.

To foster the ultimate independence of the incubated entity from the incubating entity, the agreement also should specify how and when the incubation relationship will conclude. The Commission should not impose limits on the acquisition rights of the parties. The term of the agreement must be sufficient to permit an incubated entity to gain the benefit of financial and technical support from the established broadcaster. Broadcasters' experience in this arena suggests that an incubator agreement term should be no less than three years.[21]

The Commission also seeks comment on whether to impose a maximum amount of time on an incubator arrangement.[22] NAB recognizes the value of a deadline in helping ensure that an incubated entity will become independent at some point. On balance, however, it seems wiser to leave this condition to the discretion of the parties. The Commission cannot predict if a particular incubated entity may need additional time to obtain the funds or expertise to be self-sufficient, or if marketplace or financing conditions may call for an extension.

D. Parties Should Submit a Joint Application to the FCC for Incubation Status

NAB proposes that the FCC create a simple application to participate in the incubator program for the parties to complete jointly. As the Commission notes, most applications will likely accompany an application for assignment or transfer of control of the proposed

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[21] Notice, 32 FCC Rcd at 9862 ¶ 134.

[22] *Id*.

incubated station,[23] meaning that a sufficient opportunity for public notice and comment, and the filing of petitions to deny, will be provided.[24]

As part of the application process, the FCC would determine whether the proposed incubated entity meets the eligibility standard set forth below.[25] The application should require both parties to certify they will make good faith efforts to ensure the success of the incubated station and comply with both the Commission's rules and the incubation agreement, which must be attached to the application (subject to the redaction of confidential terms). Applicants also should certify that the incubated entity will maintain control over the day-to-day operations of the incubated station. NAB believes that the terms of the incubation agreement, the potential consequences of violating the Commission's incubator program rules and the incentives of participating in an incubator arrangement as described below, together will adequately safeguard against potential abuse of the program.

III. THE MOST SUCCESSFUL BROADCAST OWNERSHIP DIVERSITY PROGRAMS ARE INCENTIVE-BASED

The most effective way to enhance minority, female and small entity broadcast ownership is the adoption of incentive-based measures that reduce barriers to entry into broadcasting. NAB has long advocated for measures that would relax certain licensing, auction, transaction and construction policies to help increase minority and female ownership in the broadcasting industry. For example, for more than two decades NAB has supported the reinstatement of the incentive-based tax certificate policy, which provided tax

[23] *Id*. at 9863 ¶ 136; 47 C.F.R. § 73.3540.

[24] 47 C.F.R. § 73.3584.

[25] *See infra* Section IV.

incentives to entities that sold broadcast properties to minority owners.[26] That policy had a clear and positive effect on minority ownership and was successful because it provided substantial tax incentives for broadcast licensees who sold media properties to minority-controlled businesses. However, since its repeal in 1995, the broadcasting industry has experienced a dramatic decline in the number of stations owned and operated by minorities.[27]

NAB believes that for an incubator program to be successful, the program must similarly provide market-based incentives for parties to participate. The incentives for the incubated entity are clear. An eligible entity will be able to access the capital needed to obtain and operate a broadcast station that is so elusive in today's financial markets. The incubatee will also receive the training, business advice and technical support needed to run the incubated station successfully, and an opportunity to obtain majority ownership of a broadcast property.

For the incubating entity, whether to incubate a new entrant is largely a business decision, so providing a meaningful economic incentive not otherwise available is paramount.[28] This cannot be overstated. If the Commission does not establish sufficient motivators, the program will fail. To avoid this fate, NAB proposes a brief menu of flexible regulatory benefits that may reasonably induce established broadcasters to participate in an incubator arrangement.

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[26] *Statement of Policy on Minority Ownership of Broadcasting Facilities,* 68 FCC 2d 979, 982 (1978); 2014 NAB Comments at 91-92 (citing *2014 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 29 FCC Rcd 4371, 4513 ¶ 311 (2014) (2014 Quadrennial Review Notice)).

[27] 2014 NAB Comments at 91-92.

[28] Notice, 32 FCC Rcd at 9863 ¶138.

First, NAB proposes that the Commission allow the incubating entity to have a financial stake in the incubated station. This is important, because it allows the established broadcaster to share in the financial success of the incubated station's operations and the proceeds of any potential sale of the station. It is far more likely that the arrangement will work if the incubator has "skin in the game."

Second, the established broadcaster's investment in the incubated station should be attributable under the Commission's rules,[29] and the broadcaster should receive a Commission waiver to exceed the applicable local or national television ownership limits,[30] or local radio ownership limits,[31] by the number of stations incubated by the broadcaster. As a practical matter, a number of the candidates for incubating a new entrant will likely be well-resourced groups that may be at or near the ownership limits, especially in local markets. For this reason, waivers to exceed the FCC's ownership limits will be important to the success of an incubator program.[32]

Third, an established broadcaster that has not yet reached the local ownership limit in the same market as the incubated station should still receive a similar inducement to

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[29] 47 C.F.R. § 73.3555 notes 1 and 2.

[30] *Id*. at § 73.3555(b) and (e). The Commission is currently undertaking a broad assessment of the national TV ownership limit. *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 32 FCC Rcd 10785 (2017).

[31] 47 C.F.R. at § 73.3555(a).

[32] NAB suggests that any such waiver should be transferable in the event of an assignment/transfer of control of either the incubating station or incubated station, or other station obtained pursuant to a waiver of an ownership limit. Any incubator program established by the Commission must provide maximum flexibility and incentives for incubating entities to participate. Notice, 32 FCC Rcd at 9863 ¶ 137.

participate in an incubator arrangement.[33] If an incubator's existing stations in the same market as the incubated station are well under the ownership limit for that market, then the ownership limit waiver described above would be of no use. However, given that some broadcasters interested in the program will likely be larger groups that have clusters of stations in multiple markets, they may very well be at or near the ownership limit elsewhere. In these instances, the incubator should be allowed to apply the ownership waiver to an impending transaction in another market of similar or larger size.[34] Such an approach would provide much needed flexibility to certain potential incubators, and in some cases, the incentive necessary to induce participation in the program. Further, this would expand opportunities for incubated entities by not limiting them only to markets where an established broadcaster interested in the program may be at or near the ownership limit.

Fourth, to further entice established broadcasters to incubate an aspiring broadcaster, the Commission's waiver of an ownership limit should also be available to broadcasters that do not have a pending or planned transaction at the time they apply to participate in the incubator program ("waiver credit"). Such a broadcaster would be allowed to "bank" this waiver credit for future use in the incubated station's market, or another market of similar or larger size, or to exceed the national TV ownership limit, at their business discretion. This credit should not expire, to provide an established broadcaster the maximum incentive for incubating a new entrant. The Commission should not be concerned about undue delay or abuse of this benefit because an incubating entity would have every

[33] Notice, 32 FCC Rcd at 9863 ¶ 137.

[34] 2013 MMTC/NAB Letter, attachment at 1. Determining if another market is similar or larger should depend on industry-accepted, commonly-used rankings of local television or radio markets, such as Nielsen data. Notice, 32 FCC Rcd at 9863 ¶ 137.

incentive to use the waiver credit strategically and promptly, given the rapidly changing media marketplace.

As discussed in Section II.B. above, the incubation relationship may end with the incubated entity purchasing the incubating entity's interest in station and transitioning to 100% ownership and operation as a full-fledged, independent broadcaster. An incubating entity should not lose the benefit of participating in the incubator program because its participation yielded the best possible outcome—a thriving, independent new station owner. To the contrary, the program should be structured so that its benefits are greatest where an incubated entity "graduates" to 100% ownership of the station. To establish the strong incentives needed to support this outcome, NAB proposes that, once an incubating broadcaster has fully divested itself of its interest in an incubated station, it would receive a new waiver credit that could be applied to ownership of another station in the same market, a pending transaction in a market of comparable size, or a future station acquisition. This innovative approach will provide sufficient incentives to attract established broadcasters to the incubator program.

IV. THE INCUBATED ENTITY ELIGIBILITY STANDARD SHOULD MINIMIZE UNCERTAINTY, GUARD AGAINST UNINTENDED USES, AND SATISFY JUDICIAL REVIEW

The Commission seeks comment on how to determine eligibility for participation in the incubator program,[35] and references several potential eligibility options, including a standard based on the new entrant bidding credit in the Commission's auction rules, a revenue-based eligible entity standard, the Small Business Administration's Socially and

[35] Notice at 9861 ¶ 131.

Economically Disadvantaged Businesses (SDB) standard, and an Overcoming Disadvantages Preference (ODP).[36]

NAB supports the adoption of a standard based on either the Commission's existing standards for a "new entrant" bidding credit or its revenue-based "eligible entity" standard. We anticipate that either of these approaches, with some modifications as discussed below, would allow the Commission to expand the universe of broadcast licensees to more minority, female, and small business owners. We also expect these standards will promote regulatory certainty, allowing prospective parties to an incubation relationship to assess quickly and easily whether a party will qualify as an incubated entity.

While NAB does not oppose adoption of an SDB or ODP standard, we recognize that there are significant legal and other impediments with using either of those approaches. Below, we discuss how the new entrant and eligible entity standards can be applied to the incubator program context. We also propose modifications designed to guard against misuse of the incubator program and ensure that only those parties who need the benefits of an incubator program receive them.[37]

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[36] *Id*.

[37] Regardless of what qualifying standard the Commission adopts, NAB proposes that an incubated entity meet the character, legal and financial qualifications standards applicable to all Commission licensees. 2013 MMTC/NAB Letter, attachment at 1; *see also Character Qualifications in Broadcast Licensing; Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees*, Report, Order and Policy Statement, 102 FCC 2d 1179 (1986).

A. New Entrant Eligibility

The "new entrant" eligibility standard is used in broadcast auctions to promote ownership diversity within the industry.[38] The Commission adopted the standard to fulfill its obligation under Section 309(j) of the Communications Act to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[39] Under the standard, an entity that holds no attributable interests in any media outlets[40] may use a bidding credit to reduce the cost of its winning bid on a broadcast construction permit by 35 percent; a 25 percent bidding credit is available to any entity that owns three or fewer media outlets nationwide. No credit is available to an entity that owns a media outlet in the same local market as the proposed broadcast stations or an entity that owns more than three media outlets nationwide.

NAB recommends that the Commission adopt a similar standard for becoming an incubated entity as a means of targeting participation to minority, women and small businesses. Specifically, we propose that the Commission should permit parties who have attributable interests in no more than three broadcast stations nationwide (not including the prospective incubated station(s)) to qualify as an incubated entity. While the new entrant

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[38] 47 C.F.R. §§ 73.5007-5008.

[39] *Implementation of Section 309(j) of the Communication Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, First Report and Order, 13 FCC Rcd 15920 ¶ 186 (1998) (citing 47 U.S.C. § 309(j)(4)(D)).

[40] For purpose of this rule, media outlets include: a daily newspaper; a cable television system; or a license or construction permit for a television broadcast station, an AM or FM broadcast station, or a direct broadcast satellite transponder. 47 C.F.R. § 73.5008(b).

bidding credit relies on the broader "media of mass communications" standard, NAB believes it is appropriate to evaluate eligibility based on ownership of broadcast stations only.[41] This will avoid excluding potential new entrants to the broadcast industry that may have interests in small non-broadcast media outlets, such as small – and perhaps struggling – local newspapers.

On the other hand, we propose making the standard to qualify as an incubated entity more restrictive than the new entrant bidding credit in two ways; both of which are designed to ensure that the benefits of the incubator program are awarded to parties that truly need financial and technical support to obtain and operate a broadcast station. First, NAB proposes that the prospective incubated entity be required to certify that, for at least one year prior to filing an application to participate in an incubator program, it has met applicable eligibility standards in terms of the number of broadcast stations owned.[42] This one-year condition will guard against potential manipulation of the program by any incubatee candidate that disposes of a financial stake in additional broadcast properties shortly before seeking to participate in the program. Second, we propose that the Commission adopt a cap on the revenue of a party seeking to qualify under the new entrant standard. We believe that an approach along the lines of the Commission's existing eligible entity definition may be appropriate.[43] As with the proposed certification concerning the number of broadcast properties, NAB would support the adoption of a certification that the

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[41] *See* Note 40, *supra.*

[42] 47 C.F.R. § 73.5007(a).

[43] Notice, 32 FCC Rcd at 9861 ¶ 131. Eligible entities are defined according to Small Business Administration (SBA) standards by industry grouping, which for radio and television stations is no more than $38.5 million in annual revenue. 13 C.F.R. § 121.201 (North American Industry Classification System (NAICS) code categories).

prospective incubated entity also has met this revenue standard for at least one year prior to the filing of an incubator application.

B. Revenue-Based Eligible Entity Standard

The Commission's existing eligible entity standard, which relies on SBA revenue groupings according to industry, could also serve as an effective way to define qualifying entities for an incubator program. NAB would support the use of such a standard with a minor modification to provide that the incubated entity does not hold an attributable interest in another station in the same market as the prospective incubated station at the time of its application. The Commission reinstated its revenue-based standard in the 2016 Quadrennial Review Order, finding that reinstating the eligible entity definition and the measures to which it applied would serve the public interest by fostering small business entry into the broadcast industry.[44] The Commission has deemed the eligible entity revenue-based standard a worthwhile approach to enhancing ownership opportunities in other contexts, such as licensing and auctions, and we submit that it could work similarly as a standard for participation in an incubator program. In this vein, we disagree with UCC that a revenue-based approach would not be an effective means of increasing broadcasting ownership by minorities and women.[45] To the contrary, we submit that it is entirely likely that minority- and female-owned small businesses would take advantage of a comprehensive incubator program that is well-designed to accomplish their goal of owning a broadcast station.

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[44] *2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864, 9983 ¶ 286 (2016) (2016 Quadrennial Review Order).

[45] Comments of UCC et al., MB Docket Nos. 14-50, 09-182, 07-294, at 15 (Aug. 6, 2014) (UCC Comments).

C. SDB and ODP Standards

Finally, NAB does not necessarily oppose the use of such standards as the Socially and Economically Disadvantaged Businesses (SDB) standard or the Overcoming Disadvantages Preference (ODP) standard mentioned in the Notice.[46] We do, however, see some potential challenges under these standards.

In *Prometheus II*, the court instructed the Commission to adopt a standard that "will be effective in creating new opportunities for broadcast ownership by women and minorities."[47] However, the Commission's discretion to fulfill this direction is limited by *Adarand Constructors, Inc. v. Pena,* which generally prohibits a government actor from implementing race-conscious eligibility standards unless it finds a compelling governmental interest in remedying the effects of past racial discrimination.[48] Although an eligibility standard invoking race or gender could very well be the most effective approach, meeting the applicable legal standards may be particularly challenging, given the Commission's recent findings of a lack of evidence of racial discrimination in prior Commission policies

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[46] Notice, 32 FCC Rcd at 9861-62 ¶ 131.

[47] *Prometheus Radio Project v. FCC,* 652 F.3d 431, 470-471 (3d Cir. 2011) (*Prometheus II*).

[48] *Adarand Constructors, Inc. v. Pena,* 515 US 200 (1995). The Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed . . . under strict scrutiny" and that "such classifications are constitutional only if they are narrowly tailored measures that further a compelling governmental interest." *Id*. at 225. The Court also reaffirmed that the only compelling governmental interest in using racial classification is to remedy prior racial discrimination. *Id*. The Commission has observed that gender-based standards are subject to intermediate scrutiny and would be upheld as constitutional if the government's actions are deemed substantially related to the achievement of an important objective. 2014 Quadrennial Review Notice, 29 FCC Rcd at 4508, ¶ 301 (citing *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003)).

related to the issuance of broadcast licenses, as well as a lack of evidence to meet even the intermediate scrutiny standard applicable to gender-based rules.[49]

In the 2016 Quadrennial Review Order, the Commission identified certain constitutional concerns because the SDB standard is explicitly race-conscious and therefore subject to heightened constitutional review.[50] The Commission concluded that evidence in the record was not sufficient to satisfy the constitutional standard,[51] and to our understanding, remains so. Similarly, the Commission has expressed concern that it was not entirely clear whether the ODP standard might also be subject to heightened constitutional scrutiny.[52] The Commission also noted that the individualized consideration required to employ the ODP standard could be unduly resource-intensive given the subjectivity of determining whether an applicant would be likely to contribute to viewpoint diversity.[53]

A standard that requires subjective determinations, like the ODP standard, also could create regulatory uncertainty unrelated to judicial review. Under a new entrant or revenue-based eligible entity standard, prospective applicants for an incubation relationship need only determine the number of broadcast interests held by the incubated entity and/or the incubated entity's annual revenue to determine potential eligibility. A standard that requires

[49] 2016 Quadrennial Review Order, 31 FCC Rcd at 9864 ¶ 299 (finding no record evidence sufficient to establish a compelling interest in remedying past discrimination); *id.* at ¶ 308 (concluding that there is insufficient evidence to establish a relationship between female ownership and viewpoint diversity and thus satisfy the constitutional standards that apply to gender-based measures).

[50] *Id*. at 9962-63 ¶ 238.

[51] *Id*. at 9987-88 ¶¶ 297-99.

[52] *Id*. at 9993 ¶ 306. The Commission further stated that, even if it was not, the record did not yet provide a method for implementing this standard without violating the First Amendment. *Id.*

[53] *Id*. at 9993-94 ¶ 306.

detailed, subjective Commission findings could deter parties from entering into incubator relationships, because they would be required to engage in significant due diligence and negotiations, and develop an agreement and complete an FCC application, without knowing whether the incubated entity will qualify until the Commission reviews the prospective incubated entity's eligibility.

In summary, NAB proposes the FCC employ either a new entrant eligibility standard or a revenue-based eligibility standard, as modified by our proposals above. Both standards are familiar to the Commission and the broadcast industry, race and gender neutral and therefore more easily legally sustainable and will provide regulatory certainty essential to an effective incubator program.

V. THE COMMISSION SHOULD ESTABLISH A PROCESS FOR ASSESSING COMPLIANCE WITH THE INCUBATOR PROGRAM POLICIES

The Commission notes that an incubation arrangement may be complicated and seeks comment on how it should monitor compliance with the terms of incubation.[54] As an initial matter, NAB agrees with MMTC, who explained that administering an incubator program should not be more burdensome or complex than monitoring compliance with merger conditions, which is commonplace for the Commission.[55] It is also unlikely there would be an overwhelming number of incubator arrangements, given their potential complexity and current market conditions.

Incubator programs should be operated with transparency and subject to Commission oversight to help ensure equitable arrangements that benefit both parties. We

[54] Notice, 32 FCC Rcd at 9864 ¶ 143.

[55] Comments of MMTC on the Incubator Issue, 2014 Quadrennial Regulatory Review, MB Docket Nos. 14-50, 09-182, 07-294, 04-256, at 7 (Apr. 17, 2017).

recommend that parties to incubator relationships file periodic reports on the status of the arrangement (perhaps no more than annually) either separately or jointly. The reports should be signed by an officer or director of each party, contain the same good faith and other certifications as the initial application, and placed in the incubated station's public file. The Commission's Enforcement Bureau (or another designated office) should review the reports, and reasonable but meaningful consequences should govern non-compliance.[56] No additional oversight or auditing by the Commission would be necessary absent a complaint.[57]

Moreover, the Commission should not be deterred from implementing an incubator program by unfounded claims that it will merely serve as a loophole for broadcasters seeking to exceed the Commission's ownership limits.[58] The same groups making these claims have yet to provide *any* proactive proposals to help increase diversity in broadcast ownership. Rather, they have campaigned for decades to retain the same rules that have only led to a decrease in diversity. The last meaningful program to increase diversity – the minority tax certificate – was successful precisely because it created meaningful incentives for broadcasters to invest in diversity. NAB's recommendations herein aim to achieve that same goal. The only way to move forward is to develop meaningful incentives for

[56] Violations of an incubator agreement may not lend themselves to a one-size-fits-all forfeiture or penalty. Based on the situation, the appropriate penalty may be a warning and increased oversight, a monetary fine, or in the most egregious cases, mandating the unwinding of the incubator relationship and/or requiring divestiture of any other station obtained pursuant to an ownership cap waiver granted as an incentive for participating in the program.

[57] While the parties to an incubation agreement will have customary contractual remedies available to them, the Commission may also wish to develop a grievance process to serve as a backstop.

[58] Notice, 32 FCC Rcd at 9860; UCC Comments at 25.

participation. Without those, a diversity program simply will not work. If the FCC and interested stakeholder, including NAB, are serious about effecting meaningful change, we must produce a viable program, not stale rules that have only served to erode diversity in the marketplace.

VI. CONCLUSION

NAB appreciates the Commission's long overdue decision to adopt and implement an incubator program to increase broadcast station ownership diversity. As set forth above, we believe that any successful program should be grounded in marketplace realities, flexible, legally sustainable and incentive-based.

Respectfully submitted,

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